

1
2
3
4
5
6
7
8
9 UNITED STATES BANKRUPTCY COURT
10 FOR THE DISTRICT OF OREGON

11 In Re:) Bankruptcy Case
12) No. 07-60532-aer13
13 LEE MICHAEL ANDERSON and)
14 AMANDA BETH ANDERSON,)
15) MEMORANDUM OPINION
16 Debtors.)

17 This matter comes before the court on objections to confirmation
18 of Debtors' Chapter 13 plan filed by secured creditors Citifinancial
19 Mortgage Company, Inc. (Citifinancial) and Umpqua Bank (Umpqua)
20 (collectively "the home lenders"). The objections are to plan paragraphs
21 relating to treatment of the home lenders' claims. The matter has been
22 briefed and is ripe for decision.

23 Background:

24 Lee and Amanda Anderson (Debtors) filed their Chapter 13 petition
25 on March 2, 2007. Their Chapter 13 plan is dated March 16, 2007. They
26 propose a \$500/month payment to the chapter 13 trustee (trustee) in ¶1.
The home lenders are secured solely in Debtors' principal residence

1 located in Klamath Falls, Oregon.¹ Both lenders are treated in plan
2 ¶2(b)(1) as to pre-petition arrears. Debtors estimate the pre-petition
3 arrearage for each at \$1,500,² which they propose the trustee pay at
4 \$100/month³ at 0% interest. In plan ¶4, Debtors propose to pay the
5 regular monthly mortgage payments due post-petition directly to the home
6 lenders. Plan ¶¶13-17 and "6"[sic]⁴ are the contested paragraphs, which
7 are discussed below.⁵

8 Applicable Bankruptcy Code Sections, Local Rules and Orders:

9 Before discussing the contested paragraphs, it is beneficial to
10 review the Bankruptcy Code sections, local procedural rules and orders
11 which are applicable to the matters at bar.

12 Bankruptcy Code Sections:⁶

18 ¹Both home lenders' claims are evidenced by promissory notes and trust deeds.

19 ²Umpqua's amended proof of claim indicates a \$1,609.35 pre-petition arrearage;
20 Citifinancial's proof of claim indicates a \$1,482.72 pre-petition arrearage.

21 ³Plan ¶2(b)(4) proposes that the trustee pay \$1,500 in remaining attorney's fees
22 before all other creditors.

23 ⁴Plan ¶ "6" should have been numbered "18."

24 ⁵The Bankruptcy Court for the District of Oregon requires that all Chapter 13
25 plans be submitted on Local Form #1300.5. Paragraphs ##1-11 thereof are largely
26 boilerplate. Some paragraphs have blanks to be filled in with particulars as to the
debtor's payment obligations and creditor treatment. Debtors may also add paragraphs to
supplement the boilerplate. The contested paragraphs are such supplemental terms.

⁶Unless otherwise indicated, all statutory references are to Title 11 of the
United States Code.

1 Section 524(i), a creature of the Bankruptcy Abuse Prevention and
2 Consumer Protection Act of 2005 (BAPCPA),⁷ gives a remedy to debtors
3 against a creditor who willfully fails to credit plan payments to the
4 debtors' material injury. The section treats such failure as a violation
5 of the discharge injunction, and perhaps counter-intuitively, bases the
6 remedy on the creditor's actions prior to the discharge.⁸ Section 524(i)
7 provides:

8 The willful failure of a creditor to credit payments
9 received under a plan confirmed under this title, unless
10 the order confirming the plan is revoked, the plan is in
11 default, or the creditor has not received payments
12 required to be made under the plan in the manner required
13 by the plan (including crediting the amounts required
14 under the plan), shall constitute a violation of an
15 injunction under subsection (a) (2) if the act of the
16 creditor to collect and failure to credit payments in the
17 manner required by the plan caused material injury to the
18 debtor.

19 Section 1322(b) (2) prohibits tampering with a lender's "rights,"
20 if the lender is secured solely in real property which is the debtor's
21 principal residence.⁹ It provides:

22 Subject to subsections (a) and (c) of this section,
23 the plan may-

24 ⁷Pub. L. 109-8, April 20, 2005, 119 stat. 23. Most of BAPCPA's provisions,
25 including §524(i) were effective for cases filed on or after October 17, 2005.

26 ⁸A debtor's remedy for violation of the discharge injunction is civil contempt.
27 Walls v. Wells Fargo Bank, N.A., 276 F.3d 502, 507 (9th Cir. 2002).

28 ⁹In Nobelman v. American Savings Bank, 508 U.S. 324, 329-330, 113 S. Ct. 2106,
29 2110, 124 L. Ed.2d 228 (1993) the court held §1322(b)(2)'s emphasis is on protecting
30 the creditor's "rights," (as opposed to its "claim"), as reflected in the relevant
31 mortgage instruments and nonbankruptcy law. The court however noted these rights could
32 be infringed by other sections of the Bankruptcy Code independent of §1322(b)(2) (e.g.
33 the automatic stay of § 362). Id.

1 modify the rights of holders of secured claims, other than
2 a claim secured only by a security interest in real
3 property that is the debtor's principal residence, or of
holders of unsecured claims, or leave unaffected the
rights of holders of any class of claims.¹⁰

4 Section 1322 (b)(5) is an exception to §1322(b)(2)' s anti-
5 modification language. It allows for "cure" of defaults and maintenance
6 of regularly scheduled payments on long term debt. It provides:

7 Subject to subsections (a) and (c) of this section,
the plan may--
8 notwithstanding paragraph (2) of this subsection, provide
9 for the curing of any default¹¹ within a reasonable time
and maintenance of payments while the case is pending on
10 any unsecured claim or secured claim on which the last
payment is due after the date on which the final payment
under the plan is due.

11
12 Section 1322(e) directs that the amount of a "cure" is determined
13 by the underlying agreement and nonbankruptcy law, as follows:

14 Notwithstanding subsection (b)(2) of this section
15 and sections 506(b) and 1325(a)(5) of this title, if it is
proposed in a plan to cure a default, the amount necessary
16 to cure the default, shall be determined in accordance
with the underlying agreement and applicable nonbankruptcy
law.

17
18 Section 1322(b)(11) is a "catch all" as to permissible plan
19 provisions. It provides:

20 Subject to subsections (a) and (c) of this section,
the plan may-include any other appropriate provision not
21 inconsistent with this title.

22
23
24 ¹⁰The § 1322(c)(2) exception to anti-modification when the mortgage debt
by its (non-accelerated) terms becomes due before the final plan payment is
due, does not apply here.

25
26 ¹¹"Any default" within the statute means that even post-confirmation
defaults can be cured through the vehicle of a Chapter 13 plan. In re
McCollum, 76 B.R. 797, 800-801 (Bankr. D. Or. 1987).

1 Section 1325(a)(1) is a confirmation requirement which provides:

2 Except as provided in subsection (b), the court
3 shall confirm a plan if- the plan complies with the
4 provisions of this chapter and with the other applicable
5 provisions of this title.

6 Local Rules and General Orders:

7 Most promissory notes and trust deeds (or mortgages) securing
8 them, have provisions allowing for imposition of fees and costs relating
9 to either the note's collection or the security's protection. The
10 Bankruptcy Court for the District of Oregon's General Order (G.O.) 97-1
11 (as amended by G.O. 98-1) addresses some of these fees and costs. It
12 gives secured creditors a choice to claim attorney's fees and costs in a
13 proof of claim and have them paid by the Chapter 13 trustee as part of
14 the cure of the debtor's default or simply give the debtor notice of
15 these costs, without payment by the trustee. A creditor may elect to
16 include some fees and costs in its proof of claim and make simple
17 disclosure as to others. G.O. 97-1.4(b)(2).

18 If a secured creditor wants its pre-petition attorneys' fees and
19 costs paid by the trustee, it must include and identify them in its
20 initial proof of claim. G. O. 97-1.4 (b)(1)(A). Post-petition, pre-
21 confirmation fees and costs must be included and identified either in the
22 initial proof of claim or in an amended proof of claim filed within 30
23 days of the confirmation order. G.O. 97-1.4(b)(1)(B) as amended by G.O.
24 98-1.6. Post-confirmation fees and costs must be included in an amended
25 proof of claim filed at least 90 days prior to the date the debtor is
26 scheduled to make the final plan payment. G.O. 97-1.4(b)(1)(c) as amended
27 by G.O. 98-1.6.

1 If the creditor does not want the trustee to pay the fees and
2 costs, it may file a proof of claim identifying the fees and costs
3 (presumably with a notation not to pay them) or give the debtor written
4 notice of the fees and costs. G.O. 97-1.4(b)(2). If notice is given, it
5 shall state the right to such fees and costs, that payment by the trustee
6 is not requested, the amount of the claim to the extent then known, and
7 the interest rate charged on any accrued fees and costs. G.O. 97-
8 1.4 (b)(2)(A). For pre-petition fees and costs, the disclosure deadline
9 is the proof of claim deadline. G.O. 97-1.4(b)(2)(B). For post-petition
10 fees and costs, the deadline is the date at least 90 days before the
11 debtor is scheduled to make the final plan payment.

12 Interested parties may request a written itemization of any fees
13 and costs to the extent not provided in a proof of claim. G.O. 97-
14 1.4(b)(3). The creditor must provide the itemization within 30 days of
15 the request. Id.

16 Whether notice is given or payment is requested via a proof of
17 claim, a party in interest must file any objection to the fees and costs
18 at least 60 days prior to the date the debtor is scheduled to make the
19 final plan payment. G.O. 97-1.4(b)(4). The 60 day deadline does not
20 preclude the court from *sua sponte* considering the reasonableness of the
21 fees. Id.

22 Finally, G.O. 97-1.4(b)(5) provides that a debtor who completes
23 his plan payments and obtains a discharge shall be deemed to have cured
24 any obligation owed to a secured creditor for fees and costs incurred no
25 later than 120 days prior to the last scheduled plan payment, unless the
26

1 secured creditor has disclosed the intent to preserve such a claim per
2 the notice procedure discussed above.

3 Local Bankruptcy Rule (LBR) 3015-1.B.9 protects a creditor from
4 automatic stay violations in servicing home mortgage maintenance payments
5 under a Chapter 13 plan. Under LBR 3015-1.B.9, if a plan provides that
6 the debtor will directly pay the regular home mortgage payments coming
7 due post-petition, "the debtor will be deemed to have authorized the
8 affected creditor to continue automatic withdrawals of payments
9 postpetition, if authorized prepetition, and to mail to the debtor: (1)
10 coupon books; (2) notices regarding payment changes; and (3) account
11 statements."

12 Discussion:

13 In summary, the contested paragraphs direct how plan payments to
14 the home lenders must be accounted for, define the ambit and procedures
15 for allowance of "arrearage" claims, and establish certain remedies for
16 failure to properly account for payments. Debtors argue the contested
17 paragraphs are necessary to implement §524(i). They argue §524(i) is
18 not self-executing, the plan must detail how the home lenders are to
19 credit the payments received. They contend that to the extent this may
20 conflict with preservation of the lenders' "rights," § 524(i) "trumps" §
21 1322(b)(2). The only court to consider this issue rejected these
22 arguments, stating, after examining the statute's text and legislative
23 history:

24 This subsection does not provide a basis for the
25 incorporation of proposed language in a Chapter 13 plan.
26 Instead, it merely provides debtors a potential remedy,
 post-discharge, if a creditor has failed to honor the

1 terms of a confirmed plan by not properly crediting
2 payments received as required by the plan.

3 In re Collins, 2007 WL 2116416, *4 (Bankr. E.D. Tenn. 2007). This court
4 agrees with the Collins court. Section 524(i) provides a remedy. It
5 does not dictate what is permissible under a Chapter 13 plan. Rather,
6 that task is governed by §§ 1322 and 1325. The contested paragraphs
7 should be measured against those sections. The court does so below,
8 setting the paragraphs out verbatim (in indented *italic* text), along with
9 the court's analysis.

10 Contested Paragraphs:¹²

11 **¶13. Application of Postpetition Ongoing**
12 **installment Payments Made by Debtors.** *The*
13 *ongoing postpetition installment payments on*
14 *the Debtors' home mortgaged [sic] will be paid*
by the Debtors directly to Citifinancial
Mortgage and to Umpqua Bank, beginning with
the payment due on April 1, 2007.

15 This provision is surplusage. The boilerplate in plan ¶4
16 already provides that Debtors will directly pay the regular payments due
17 postpetition in accordance with the terms of the respective contracts.
18 The April 1, 2007 payment was the first payment due post-petition, and
19 does not have to be so specified.

20 *The payments received by Citifinancial and/or*
21 *Umpqua Bank from the Debtors for ongoing*
22 *postpetition installment payments shall be*
applied and credited to the Debtors' mortgage
accountd [sic] as if the account were current

25 ¹²The contested paragraphs are borrowed virtually verbatim from sample
26 paragraphs suggested in the article *Challenging Mortgage Servicer 'Junk' Fees*
and Plan Payment Misapplication: Making Use of New section 524(i), 25 NCLC
Reports: Bankruptcy And Foreclosures Ed., Nov./Dec. 2006.

1 *and no prepetition defaults existed on the*
2 *petition date*

3 This provision is ambiguous. Debtors' intent is that the post-
4 petition maintenance payments be accounted for as if there was no pre-
5 petition default (the arrearage being paid separately through the
6 trustee). If it simply said that, the provision might pass muster. See,
7 In re Wines, 239 B.R. 703, 707 (Bankr. D. Id. 1999). However, it adds
8 language that the payments are to be applied and credited as "if the
9 accounts were current." If Debtors fall behind in their post-petition
10 maintenance payments, the plan appears to force the home lenders to
11 account for these late payments as current. This would modify their
12 rights in contravention of §1322(b)(2).

13 *in the order of priority specified in the*
14 *note(s) and security agreement(s) and*
 applicable nonbankruptcy law.

15 This provision is surplusage. The boilerplate in plan ¶2(b)
16 provides that "the terms of the debtor's prepetition agreement with each
17 secured creditor shall continue to apply, except as otherwise provided in
18 this plan or in the confirmation order."

19 *If these postpetition installment payments are*
20 *made in a timely manner under the terms of the*
21 *note, they shall be applied and credited*
 without penalty.

22 Debtors defend this clause, arguing that payments to mortgagees
23 by Chapter 13 trustees are often put in "suspense" accounts, to be
24 credited later and assessed a "late fee." However here, the trustee is
25 not making the maintenance payments. Both notes allow for a late charge
26 if the "full" monthly payment is not made within 15 days of the due date

1 (the first of the month). Umpqua's trust deed allows it to accept a
2 (partial) payment which does not bring the loan current, and not apply it
3 (i.e. hold it in a "suspense" account), until enough is later paid to
4 bring the loan current. Thus it's possible, a partial payment in
5 "suspense" which later is credited, could be considered "late" and
6 assessed a late penalty as provided in the note. To the extent the
7 provision attempts to modify this, it contravenes § 1322(b)(2). To the
8 extent it simply restates that a full timely payment must be credited
9 without penalty, it is surplusage as the notes already provide for this
10 treatment.

11 ***¶14. Amount of Postpetition Ongoing
Installment Payments Made by Debtors.***

12 *Citifinancial and/or Umpqua Bank shall comply*
13 *with all applicable provisions of the Real*
14 *Estate Settlement Procedures Act (RESPA) and*
the Truth in Lending Act (TILA) during the
pendency of this plan,

15 This provision is surplusage if it accurately states what is
16 required under the notes/trust deeds or nonbankruptcy law. It is
17 "inappropriate" under §1322(b)(11) if it misstates what is required.
18 Debtors cannot, by fiat, impose law which would otherwise not apply.

19 *and shall make, upon notice to the Debtors,*
20 *Debtors' counsel and the Trustee, appropriate*
21 *adjustments to the ongoing installment payment*
22 *amount(s) to reflect escrow account(s),*
adjustable rate mortgagees) and other changes
required by the note(s) and security
agreement(s).

23 The home lenders' notes are fixed rate, so the verbiage regarding
24 adjustable rate mortgages is surplusage. The trust deeds require escrows
25 for taxes and insurance, with Debtors paying 1/12 of the annual estimate
26 each month. The requirement is waived in Citifinancial's trust deed if

1 Debtors make such payments to an institutional lienholder in senior
2 position. Umpqua's proof of claim contains an \$80.25 charge for
3 "Projected Escrow Reserves." Citifinancial's does not. From this, and
4 Citifinancial's junior position, the court infers no escrow is set up for
5 the Citifinancial loan,¹³ and thus verbiage relating to its escrow
6 balances is surplusage.

7 Umpqua's trust deed requires notice to Debtors of changes in the
8 escrow amounts required. The plan provision imposes an additional duty
9 to notify Debtors' counsel and the trustee. Umpqua argues this
10 additional notice "modifies" its rights in contravention of
11 §1322(b) (2). However, additional notice is more in the nature of a
12 procedural requirement to aid Chapter 13 administration, than a
13 modification and is therefore permissible. See, In re Wilson, 321 B.R.
14 222 (Bankr. N.D. Ill. 2005); In re Andrews, 2007 WL 2793401 (Bankr. D.
15 Kan. 2007); Collins, supra.¹⁴

16 Umpqua also argues requiring notice would violate the automatic
17 stay. However, plan ¶2(b)(1)'s boilerplate incorporates all the terms
18 of Umpqua's underlying note and trust deed, which in turn requires
19 notice. Umpqua has not objected to this boilerplate. In any event, LBR
20 3015-1.B.9 provides for the Debtors' deemed authorization of such
21 notices, and thereby insulates Umpqua from alleged stay violations.

23
24 ¹³There is no reasonable inference that a borrower would have two tax
25 and insurance escrows set up with two separate lenders secured in the same
property.

26 ¹⁴This limited "extra" notice is permitted solely to facilitate
administration of the Chapter 13 case. It should not be interpreted as an
invitation to require notice to all creditors or other parties in interest.

1 *If there is a shortage, deficiency or surplus*
2 *of funds held in escrow as defined under*
3 *RESPA during the pendency of this plan,*
4 *Citifinancial and/or Umpqua Bank shall notify*
5 *the Debtors as required by RESPA, and shall*
6 *also provide notice to Debtors r counsel and*
7 *the Trustee.*

8 The court's discussion immediately above also applies to this
9 provision.

10 ***¶15. Application of Cure Payments Disbursed***
11 ***by Trustee.*** *The Debtors will cure the*
12 *default(s) on the mortgagees) within a*
13 *reasonable period of time by making payments*
14 *on the arrears through the plan, which*
15 *payments shall be disbursed by the Trustee to*
16 *Citifinancial and/or Umpqua Bank.*

17 This provision is ambiguous. The term "cure. . . within a
18 reasonable time by making payments" could be construed as a vague and
19 indefinite period with indefinite payment amounts, which conflicts with
20 plan ¶¶2(b)(1) and 2(b)(4), which allow for cure at \$100/mo. after
21 attorney's fees are paid. To the extent it doesn't conflict with these
22 paragraphs, it is surplusage. Further, ¶2(b)(1) already provides that
23 the trustee will pay the arrears, and as such the remaining language is
24 surplusage.

25 *The payments disbursed by the Trustee to*
26 *Citifinancial and/or Umpqua Bank shall be*
27 *applied and credited to the amount necessary*
28 *to cure the default(s), which shall be*
29 *referred to as the "arrears" for the purposes*
30 *of this plan.*

31 This provision is surplusage. It is intended to protect Debtors
32 from the home lenders' application of payments meant for the arrears, to
33 other parts of the loan. This rightly assumes the home lenders have an
34 obligation to separately account for the arrears paid by the trustee

1 through ¶2(b)(1). See, Nosek v. Arneriquet Mtg. Co. (In re Nosek), 363
2 B.R. 643, 645 (Bankr. D. Mass. 2007). That the home lenders must apply
3 the trustee's ¶2(b)(1) payments to the arrears is implied however,
4 because plan ¶¶2(b)(1) and 4 make clear this is a "cure and maintain"
5 plan and ¶2(b)(1) designates that the arrears and only the arrears are
6 what the trustee is paying on the lenders' claims. If the home lenders
7 don't apply these payments to the arrears, they expose themselves to a
8 § 524(i) claim for contempt.

9 **¶16. Amount of Cure Payments Disbursed by**
10 **Trustee.** *The arrears shall consist of the*
11 *following items, to the extent they are listed*
12 *and separately itemized on the Citifinancial*
13 *and/or Umpqua Bank's proof(s) of claim, are*
14 *reasonable and have been actually incurred,*
15 *and are authorized and have been properly*
16 *assessed under the terms of the note and*
17 *security agreement and applicable*
18 *nonbankruptcy law:*

- 19 a) *any unpaid prepetition installment*
20 *payments due;*
- 21 b) *any unpaid prepetition late fees;*
- 22 c) *any unpaid prepetition attorney*
23 *fees;*
- 24 d) *any unpaid prepetition fees for*
25 *services performed in connection with*
26 *Debtor's prepetition default(s) or for*
the purpose of protecting
Citifinancial and/or Umpqua Bank's
interest in the note and security
agreement;
- (e) *any unpaid attorney fees and*
costs incurred postpetition but prior
to confirmation;
- (f) *any prepetition unpaid escrow*
shortage or deficiency, as defined
under RESPA, to the extent not being
recovered as part of the unpaid
prepetition installment payments
provided in (a) above; and
- (g) *any postpetition interest on the*
arrears, if expressly provided for in
the terms of the note and security
agreement.

1 The amounts required to be paid by the Debtors
2 for the above listed items of arrears in order
3 to cure the default(s) shall be the amounts
4 stated in the Citifinancial and/or Umpqua
5 Bank's proof(s) of claim, unless the Debtors
6 or Trustee dispute the amount, in which case
7 the amount of arrears will be the amount
8 ultimately decided by the Court or agreed to
9 by the parties.

10 Debtors admit this paragraph "spells out what may be in a proof
11 of claim." Debtors' Opening Memorandum, 18th page (unnumbered). A plan
12 is the wrong place to do this. Further, Debtors cannot define the
13 universe of what constitutes "arrears." That definition is provided by
14 § 1322(e), which incorporates the parties' agreements and nonbankruptcy
15 law.¹⁵ Atwood v. Chase Manhattan Mtg. Co. (In Re Atwood), 293 B.R. 227,
16 231 (9th Cir. B.A.P. (Nev.) 2003). To the extent plan ¶16 diverges from
17 § 1322(e) (and the underlying agreements and nonbankruptcy law), it is
18 "inappropriate" under § 1322(b)(11). To the extent it reiterates the
19 parties' agreements and nonbankruptcy law, it is surplusage. To the
20 extent it requires that pre-petition, and post-petition, pre-confirmation
21 arrears be set out in a proof of claim and paid by the trustee, at least
22 as to attorney's fees and costs, it contravenes G.O. 97-1, which gives a
23 secured creditor the choice of including such fees and costs in a proof
24 of claim or simply disclosing them.¹⁶ To the extent the provision
25 requires arrearage components to be set out in a proof of claim subject

26 ¹⁵Paying "arrears" is what "cures" a default. Cohen v. Lopez (In re Lopez), 372 B.R. 40, 49 (9th Cir. B.A.P. (C.D. Cal.) 2007) ("cure . . . inextricably intertwined with the concept of arrears") .

¹⁶G.O. 97-1's disclosure procedure as to attorney's fees and costs (with opportunity to object) protects the "due process" Debtors argue they are entitled to.

1 to objection, if the home lenders seek payment from the trustee, it
2 tracks ¶2(b)(1) which provides the trustee will only pay "allowed"
3 claims, and is thus surplusage.¹⁷ To the extent it seeks to define what
4 interest rate can be charged on the arrearage, it is surplusage, as it
5 restates § 1322(e). To the extent it requires that the post-confirmation
6 interest rate be stated in the proof of claim, ("g" above), it is
7 unnecessary, as the plan at ¶2(b)(1) contains a column for same. To the
8 extent it limits the parties who may file claims objections to the
9 Debtors and the trustee, it is inappropriate as any party in interest has
10 standing to object to claims. § 502(a). To the extent the requirement
11 that the arrears be "reasonable" tracks what is required under the
12 agreements, nonbankruptcy law and/or the Bankruptcy Code, it is
13 surplusage; to the extent an arrearage element need not be "reasonable"
14 to be allowed, the provision misstates the law, and is thus
15 "inappropriate."

16 **¶17. Additional Payments for Postpetition**
17 **Arrears.** *The arrears shall also include any*
18 *postpetition arrearage amounts consisting of*
19 *the following items, but only to the extent*
20 *these amounts are reasonable and have been*
21 *actually incurred, are authorized by the note*
22 *and security agreement and applicable*
23 *nonbankruptcy law, and have been approved by*
24 *court order or agreement between the*
Citifinancial and/or Umpqua Bank, the Debtors
and the Trustee:

- a) *any delinquent postpetition*
installment payments due;
- b) *any unpaid postpetition late fees;*

¹⁷Plan ¶2(b)(1) requires that Debtors, if curing and reinstating, must state the estimated prepetition arrearage. It then provides: "THE ARREARAGES SHOWN IN A TIMELY FILED AND ALLOWED SECURED CLAIM SHALL CONTROL." This clause does not limit arrearages to pre-petition arrears; thus post-petition arrearages may also be paid through ¶2(b)(1). See, McCollum, supra.

1 c) any unpaid reasonable postpetition
2 attorney fees, to the extent not being
3 recovered under paragraph 16(d) above;
4 d) any unpaid postpetition escrow
5 shortage or deficiency, as defined
6 under RESPA, to the extent not being
7 recovered as part of the unpaid
8 postpetition installment payments
9 provided in (a) above; and
10 (e) any interest on the postpetition
11 arrears, if expressly provided for in
12 the terms of the note and security
13 agreement.

14 As discussed above, Debtors cannot define the term "arrears."
15 Further, to the extent ¶17 reiterates the parties' agreement and
16 nonbankruptcy law, it is surplusage. Paragraph 17 also expands ¶16's
17 definition of "arrears" to include "post-petition" arrears, and thus
18 requires that post-petition arrears be set out in a proof of claim and
19 paid by the trustee. At least as to attorney's fees and costs, this
20 contravenes G.O. 97-1. Also, ¶17, like ¶16, requires a
21 "reasonableness" finding as to all arrearage elements, and may be
22 problematic for the reasons stated above. Further, ¶17 allows post-
23 petition arrears only after "court order or agreement between
24 Citifinancial and/or Umpqua Bank, the Debtors and the Trustee." This
25 contradicts ¶2(b)(1) which provides for payment of "allowed" claims. An
26 "allowed" arrearage claim does not necessarily require that a court order
27 be entered or an agreement reached. If a creditor's original or amended
28 proof of claim includes post-petition arrears and no party in interest
29 objects, the claim is deemed allowed without court order or agreement.
30 11 U.S.C. § 502(a); see, also, In re Maxwell, 343 B.R. 278, 279 (Bankr.
31 M.D. Fla. 2005) (holding a plan clause requiring a court order allowing
32 post-petition fees, costs and interest violated § 1322(b)(2)). Finally,

1 requiring payment of all post-petition arrears (along with pre-petition
2 arrears) through this plan will be problematic, as the plan is scheduled
3 to run 60 months, and Debtors are already dedicating all their disposable
4 income. The plan does not have the flexibility to fund post-petition
5 arrears without decreasing the approximate 11% dividend to general
6 unsecured creditors currently proposed. Paying post-petition arrears in
7 any significant amount would most likely necessitate a modified plan.

8 **¶6 [sic]¹⁸ Mortgage Current upon Plan**

9 **Completion.** No other fees, costs or amounts
10 incurred by Citifinancial and/or Umpqua Bank
11 during this chapter 13 case and asserted to be
12 due on the Debtors' mortgage account(s) may be
13 collected or charged to the Debtors during the
14 case or after entry of discharge except as
permitted by this plan, and no payments
received by Citifinancial and/or Umpqua Bank
from the Debtors or the Trustee shall be
applied and credited except as directed and
required by this plan.

15 Again, this provision locks the home lenders into a proof of
16 claim, at least as to attorney's fees and costs, in contravention of G.O.
17 97-1. Further, it bootstraps them into collecting only those fees and
18 costs "permitted by this plan." As the court interprets the contested
19 paragraphs, only fees and costs in an allowed proof of claim, which are
20 paid by the trustee are "permitted." If however, Debtors default under
21 the plan, and the home lenders are granted relief from the automatic
22 stay, this clause could conceivably prevent the lenders from collecting
23 their fees and costs upon non-judicial foreclosure and sale. Only in the
24 rare instance would a plan "permit" foreclosure.

25
26 ¹⁸As noted above, ¶"6" should have been numbered "18."

1 *Prior to completion of payments under this*
2 *plan, citifinancial and/or Umpqua Bank may*
3 *seek a determination concerning the*
4 *sufficiency of payments received under the*
5 *plan. Unless the Court orders otherwise,*
6 *pursuant to an appropriate motion or pleading,*
7 *an order granting a discharge in this case*
8 *shall be a determination that all prepetition*
9 *and postpetition defaults with respect to the*
10 *Debtors' mortgage(s) have been cured within*
11 *the meaning of § 1325(b)(5) [sic],¹⁹ and that*
12 *the Debtors' mortgage account(s) is deemed*
13 *current and reinstated on the original payment*
14 *schedule under the note(s) and security*
15 *agreement(s) as if no default(s) had ever*
16 *occurred.*

17 Being deemed "current" at the end of the plan is the goal for
18 Chapter 13 debtors curing and reinstating home mortgages. The clause
19 giving the home lenders an opportunity to seek a court determination of
20 the sufficiency of payments received is unremarkable, and probably
21 unnecessary, as the court knows of no statute or rule prohibiting same.
22 The balance of the paragraph contravenes G.O. 97-1 as to attorney's fees
23 and costs, because it assumes all arrears will be paid through the plan.
24 Even if the requirement that all arrears be set out in a proof of claim
25 is stricken, the provision creates a default rule deeming cure upon
26 discharge unless the creditor has filed a motion and obtained a court
order otherwise. While courts have upheld procedural hoops to preserve
collection of arrearages as not being "modifications" of secured
creditors' rights, see e.g., Wilson, supra; Andrews, supra,²⁰ Jones v.

¹⁹Section "1325(b)(5)" does not exist. The reference was most likely
intended to be "§1322(b)(5)."

²⁰In fact, as to attorney's fees and costs, G.O. 97-1 sets up one such
procedural scheme, which has drawn no objection in the case at bar.

1 Wells Fargo (In re Jones), 2007 WL 2480494 (Bankr. E.D. La. 2007),
2 putting the onus on the creditor to obtain a court order contravenes G.O.
3 97-1 as to attorney's fees and costs. See also, Maxwell, supra.

4 *Any willful failure of Citifinancial and/or*
5 *Umpqua Bank to credit payments in the manner*
6 *required by this plan or any act by*
7 *Citifinancial/and/or Umpqua Bank following the*
8 *entry of discharge to charge or collect any*
9 *amounts incurred or assessed during the*
10 *pendency of this chapter 13 case that were not*
11 *authorized by this plan or approved by the*
12 *Court after proper notice shall be a violation*
13 *of 11 U.S.C. § 524 (i) and the injunction under*
14 *§524(a)(2).*

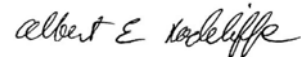
15 This provision is "inappropriate" under §1322(b)(11). It
16 purports to preserve Debtors' §524(i) remedy, but does not accurately
17 track its language, among other things, omitting the requirement that
18 there be material prejudice caused by the failure to credit. Further,
19 the provision suffers from the problem discussed above, where collection
20 is limited to amounts authorized by the plan or by court order. The plan
21 only authorizes arrearages through proofs of claims, which, as to
22 attorney's fees and costs, violates G.O. 97-1. Further, G.O. 97-1 does
23 not require a court order, only notice, to preserve an arrearage claim.

24 Conclusion:

25 One intent behind the contested paragraphs is to make sure there
26 are no surprises after completion of the plan regarding the balances due
on Debtors' home mortgages. This is a laudable end, but the means
employed unnecessarily confuse the process. Aside from the clauses
requiring "extra" notice to Debtors' counsel and the trustee, for the
reasons stated above, the contested paragraphs cannot stand.
Confirmation of Debtors' plan dated March 16, 2007 will thus be denied.

1 Debtors will be given 30 days from entry of the order denying
2 confirmation to file an amended plan.²¹ An order consistent with the
3 above will be entered.

4 This opinion constitutes the court's findings of fact and
5 conclusions of law under FED.R.BANKR.PROC. 7052. They shall not be
6 separately stated.

7 

8 ALBERT E. RADCLIFFE
9 Bankruptcy Judge

10
11
12
13 ²¹The court would be remiss if it did not give some guidance as to what
14 might be "appropriate" plan provisions to ensure no surprises at plan's end.
15 G.O. 97-1 already provides a set of procedures. However, its scope is
16 limited. A plan provision expanding that scope, such as: "The procedures set
17 out in G.O. 97-1 (as amended by G.O. 98-1), shall apply to all arrearage
18 amounts (pre and post-petition), including all fees and costs, claimed by
19 Umpqua and Citifinancial," would likely be "appropriate." However, the court
thinks it fair to alert the parties that this District's Local Bankruptcy
Rules are currently being revised, and it is probable that G.O. 97-1.4(b)(5)'s
"deemed cure" provisions will not survive the revisions. If "deemed cure"
language is in fact stricken from the revised local rules, insertion of
similar language into a Chapter 13 plan, with the broadened scope outlined
above, would also seem appropriate.

20 The court further notes that the following language has been approved in
other Chapter 13 plans in this district.

21 Post-petition mortgage payments to secured creditor
22 shall be applied to the first post-petition payment due
under the terms of the contract. Payments from the
23 trustee to secured creditor shall be applied to its
pre-petition loan arrears claim. As long as debtor timely
24 pays all post-petition payments, secured creditor shall
not assess any fees or other charges on the basis that a
postpetition payment is late.

25 Lender shall send such billing statements, coupons and
26 statements regarding post-petition advances and/or
charges on the loan directly to the debtor as it
customarily sends when no bankruptcy has been filed.